



Paper No. 4

CALFEE HALTER & GRISWOLD, LLP
800 SUPERIOR AVENUE
SUITE 1400
CLEVELAND OH 44114

COPY MAILED

MAR 07 2002

OFFICE OF PETITIONS

In re Application of	:	
Sanders et al.	:	
Application No. 09/966,551	:	DECISION DISMISSING
Filed: 7 November, 2001	:	PETITION
Attorney's Docket No. 26272/04003	:	

This is a decision on the petition styled under 37 CFR 1.182 filed on 7 November, 2001, which is treated as a petition under 37 CFR 1.53(e) and 1.10(e) to accord the above-identified application a filing date of 26 September, 2001, including two (2) pages containing 11 claims as a part of the initial disclosure.

The petition is **DISMISSED**.

On 26 September, 2001, the application was deposited without claims. Accordingly, on 26 October, 2001, Initial Patent Examination Division mailed a Notice of Incomplete Nonprovisional Application, stating that, *inter alia*, the application was incomplete because the specification does not include at least one claim, and that the filing date will be the date of receipt of at least one claim. In response, on 7 November, 2001, petitioners filed the present petition accompanied by, *inter alia*, two (2) pages containing 11 claims.¹

¹A duplicate copy of the petition and accompanying documentation was filed by facsimile on 1 February, 2002.

Petitioners assert that the two (2) pages containing 11 claims were present on filing on 26 September, 2001. In support, petitioners supplied with the present petition, a copy of a postcard receipt itemizing the filing of, *inter alia*, 36 pages of a "Utility Patent Application and Drawings." Petitioners also submitted a copy of an Express Mail customer label as evidence that the application, including the missing drawing figure, were deposited in Express Mail Post Office to Addressee service on 26 September, 2001. The "date-in" on the copy of the Express Mail label submitted with the present petition is not legible. A legible copy was presented with the papers supplied on 7 November, 2001, however. The "date-in" on the Express Mail label is 9/26/01.

A review of the record reveals that no two (2) pages containing 11 claims are located among the application papers deposited on 26 September, 2001.

The argument and evidence supplied with the petition have been carefully considered, but are not persuasive. The USPTO has a well-established and well-publicized practice of providing a receipt for papers filed in the USPTO to any applicant desiring a receipt. The practice requires that any paper for which a receipt is desired be filed in the USPTO with a self-addressed postcard identifying the paper. A postcard receipt which itemizes and properly identifies the papers which are being filed serves as prima facie evidence of receipt in the USPTO of all the items listed thereon on the date stamped thereon by the USPTO. See section 503, Manual of Patent Examining Procedure (MPEP 503). Unfortunately, petitioners' postcard receipt does not bear an Office-date stamp from the USPTO. As such, the postcard receipt does not serve as evidence that the items listed therein were received in the USPTO. If petitioners have a copy of the postcard receipt for this application with a USPTO "Office date" stamp, a copy of that postcard should be submitted with any renewed petition.

Additionally, petitioners should note that the Express Mail mailing label is not persuasive evidence of the receipt of two (2) pages of 11 claims on 26 September, 2001, because the other application papers filed by Express Mail were received on 26 September, 2001. Where there is a dispute as to the contents of correspondence submitted to the Office an applicant may not rely upon the provisions of 37 CFR 1.10(e) to establish what documents and or fees were filed in the Office with such correspondence. A petition under 37 CFR 1.10 is therefore inappropriate in the

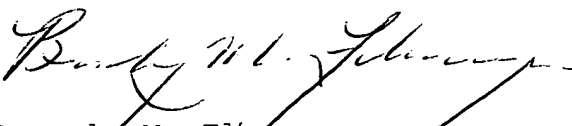
present case.² A petition under 37 CFR 1.10(e) is only appropriate where the correspondence was sent by Express Mail but nothing was received by the Office.

The application will be processed and examined using the application papers filed on 26 September, 2001, and the two (2) pages containing 11 claims supplied on 7 November, 2001. The copies of other application papers supplied with the present petition on will not be used for processing or examination purposes, but will be retained in the application file.

As the petition is due to a filing error on the part of applicant and not an error on the part of the USPTO, the petition fee of \$130.00 will be assessed to counsel's deposit account, No. 03-0712.

The application is being returned to the Office of Initial Patent Examination for reprocessing with a filing date of 7 November, 2001, using the application papers deposited on 26 September, 2001, and the two (2) pages containing 11 claims supplied on 1 November, 2001.

Telephone inquiries concerning this matter may be directed to Petitions Attorney Douglas I. Wood, at (703)308-6918.


Beverly M. Flanagan
Supervisory Petitions Examiner
Office of Petitions
Office of the Deputy Commissioner
for Patent Examination Policy
